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Nos. 87-2084, 88-214



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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NORMAN JETT,

*Petitioner,*

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

*Respondent.*

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DALLAS INDEPENDENT SCHOOL DISTRICT,

*Cross-Petitioner,*

v.

NORMAN JETT,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN CIVIL LIBERTIES UNION

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## QUESTIONS PRESENTED

1. Must a public employee who alleges job discrimination on the basis of race show that the discriminaton resulted from an official "policy or custom" in order to recover under 42 U.S.C. §1981?

2. Did the Fifth Circuit's decision correctly apply Monell v. Department of Social Services, 436 U.S. 658 (1978), and it progeny?

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BRIEF AMICI CURIAE
OF THE NAACP LEGAL DEFENSE AND
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## INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Over the course of the last two decades, the Fund's attorneys have represented plaintiffs in a substantial number of section 1981 cases, both in the lower courts and in this Court. See, e.g., Patterson v. McLean Credit Union, No. 87-107; Lytle v. Household Manufacturing, Inc., No. 88-334.

[1] Letters from the parties consenting to the filing of this brief have been filed with the Court.

We currently represent in pending section 1981 actions a number of plaintiffs whose rights will necessarily be significantly affected by this Court's decision in the instant case.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to defending civil liberties and civil rights. In pursuit of that goal, the ACLU has participated in numerous cases before this Court involving the interpretation of federal civil rights statutes. This case raises again the question of whether those laws will remain an effective tool for combatting discrimination. The resolution of that question is a matter of vital concern to the ACLU.

SUMMARY OF THE ARGUMENT

The interpretation of the 1866 Civil Rights Act must be based on the terms and



legislative history of that statute, not on the meaning and history of the 1871 Civil Rights Act. The membership of the House of Representatives in the thirty-ninth and forth-second Congresses, which adopted the 1866 and 1871 acts respectively, was almost entirely different. Of the 122 Representatives who voted in 1866 for the first Civil Rights Act, only 15 were still in the House in 1871, and only 4 of these voted against the Sherman amendment.

Whether respondeat superior, or comparable contract doctrines, should be applied to a section 1981 claim turns on the principles of common law which would have governed similar claims in 1866. Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The Fifth Circuit in the instant case correctly acknowledged that respondeat superior would apply to a

section 1981 claim against a private defendant. Jett v. Dallas Independent School District, 798 F.2d 748, 763 (5th Cir. 1986). It would be incongruous if a lesser standard of liability were applied to claims against government defendants.

In 1866 the doctrine of respondeat superior was widely utilized to determine the degree of municipal liability for a violation of a legal duty by a city employee. Weightman v. Washington, 66 U.S. (1 Black) 39 (1861). In this era municipal corporations were generally subject to "the same standards of liability as any private corporation." Owen v. City of Independence, 445 U.S. 622, 644 (1980). The principles of respondeat superior were applied by state courts prior to 1866 to determine whether a slaveowner could recover damages from a city for injuries inflicted on a slave by



city employees. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850).

The 1866 Civil Rights Act, in the period prior to the enactment of the 1871 Act, clearly did not require proof of official policy or custom. The adoption of the 1871 statute did not alter the meaning of the 1866 law. Repeals by implication are disfavored. Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984).

## ARGUMENT

The decisions of the Fifth Circuit in this case proceed from one essential but critically flawed premise -- that the meaning of the 1866 Civil Rights Act can and should be divired by reference to the meaning and now reigning construction of the 1871 Civil Rights Act. In its initial opinion the panel below asserted that the doctrine of respondeat superior could not be applied in section 1981 actions against

governmental bodies because, on its view, "[t]o impose such vicarious liability for... certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983." Jett v. Dallas Independent School District, 798 F.2d 748, 762 (5th Cir. 1986). The panel in its second opinion relied on what it believed to be "the appropriateness of parallel treatment in this respect of these two post-Civil War statutes." Jett v. Dallas Independent School District, 837 F.2d 1244, 1248 (5th Cir. 1988).

Under most circumstances, however, the interpretation of one statute must be based on its own terms and legislative history, not on the history and meaning of a distinct and subsequent law. An exception might be appropriate for two related and similarly worded statutes adopted



simultaneously by the same Congress to solve the same problem. But such a relationship does not exist between the 1866 Civil Rights Act and the 1871 Civil Rights Act. The 1866 Act was enacted by the thirty-ninth Congress pursuant to the Thirteenth Amendment, and covers both private and governmental acts of discrimination; the 1871 Act was adopted by the forty-second Congress pursuant to the Fourteenth Amendment, covers a wide variety of constitutional and statutory claims, and extends only to conduct under color of state of law. In District of Columbia v. Carter, 409 U.S. 418 (1973), this Court unanimously rejected a similar claim that the 1866 and 1871 acts should be accorded "parallel treatment"; Carter held that, although the words "state and territory" in the 1866 Act encompass the

District of Columbia, those same words in the 1871 Act do not refer to the District.

The legislation enacted by the forty-second congress is a particularly unreliable guide to the intent of the thirty-ninth congress because of the almost total change in the membership of the House of Representatives between 1866 and 1871. Of the 122 members of the thirty-ninth congress who voted for the 1866 Civil Rights Act, only 15 were still members of the House when the 1871 Act was adopted.[2] The interpretation of section 1983 in Monell v. Dept. of Social Services, 438 U.S. 658, 664-701 (1978), turned largely

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[2] Compare Cong. Globe, 39th Cong., 1st sess. 3, 1861 (1866) with Cong. Globe, 42nd Cong., 1st sess. 5, 801 (1871). The representatives who voted for the 1866 act and were still in the House in 1871 were Nathaniel Banks, Burton Cook, Henry Dawes, John Farnsworth, James Garfield, Samuel Hooper, William Kelley, John Ketcham, John Lynch, Ulysses Mercur, Leonard Myers, Philetus Sawyer, Glenni Scofield, Samuel Shellabarger and William Washburn.



on the vote of the House of Representatives in 1871 rejecting the Sherman amendment. But the rejection of the Sherman amendment by the congressmen in the House in 1871 tells us absolutely nothing about the views of the wholly different group of congressmen who served in 1866. Indeed, among the 15 former members of the thirty-ninth congress who were elected to the forty-second congress, only 4 voted against the Sherman amendment.[3] Representative Shellabarger, the House sponsor of and chief spokesman for the bill containing the Sherman amendment, 436 U.S. at 669-73, was one of the few supporters of the 1866 Act still in Congress in 1871; of the five congressmen whose remarks in opposition to the Sherman amendment were referred to in Monell, only

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[3] Banks, Cook, Farnsworth and Garfield.

one had even been a member of the earlier thirty-ninth congress.[4]

For these reasons, the 1866 and 1871 acts should be separately evaluated. The first issue is whether the 1866 Civil Rights Act, as originally enacted, required proof of official policy or custom; if, as we urge, the Court holds that the 1866 Act contained no such requirement, it should then consider whether, by adopting the 1871 Act, Congress intended by implication to amend that earlier law and impose such a requirement.

## I. THE 1866 CIVIL RIGHTS ACT, AS ORIGINALLY ENACTED, DID NOT REQUIRE PROOF OF OFFICIAL POLICY

The question raised by this case is not whether a city or private corporation can be held liable because of discrimina-

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[4] 436 U.S. at 673-82 (Reps. Blair, Burchard, Farnsworth, Poland and Willard).



tion by one of its employees, but only when the imposition of such liability is appropriate. Corporations, be they private or municipal, can only act through natural persons; if, as respondent does not deny, cities are subject to suit under section 1981, it will necessarily be as a consequence of discrimination by one or more municipal employees or agents.

The terms of the 1866 Civil Rights Act do not themselves expressly establish any rule regarding when an employer may and may not be held liable for discriminatory acts by its employees. But that silence does not, as the Fifth Circuit believed, authorize the courts to create whatever liability rules they may think supported by their own views of social policy or current "judge-made law." 837 F.2d at 1248. Rather, here, as in ordinary cases of statutory construction,

Congress is presumed to have intended that such liability issues would be controlled by the common law rules applicable to similar claims at the point in time when the statute in question was adopted:

> One important assumption underlying the Court's decisions in this area is that members of the ... Congress were familiar with common-law principles ... and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

Newport v. Facts Concerts, Inc., 453 U.S. 247, 258 (1981).[5] Such common law principles are assumed to control litigation under section 1981 except in those cases where they would "defeat the promise

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[5] E.g., Owen v. City of Independence, 445 U.S. 662, 637 (1980) (principles "firmly rooted in the common law"); Imbler v. Pachtman, 424 U.S. 409, 418 (1970) (statute "read in harmony with general principles of tort immunity and defenses rather than in derogation of them"); Wood v. Strickland, 420 U.S. 308, 318 (1975) ("common law tradition"); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) ("doctrines ... solidly established at common law").



of the statute." Newport v. Fact Concerts, Inc., 453 U.S. at 259.[6]

The court below assumed that, in evaluating the potential liability of an employer, all section 1981 claims should be regarded as torts, and that the issue presented by this case is thus simply whether the doctrine of respondeat superior should be applied in these cases. The common law, however, encompassed two

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[6] Respondent suggested below that the imposition of liability on the city in this case would be inappropriate because intentional racial discrimination is analogous to an intentional tort for which an employer, even under common law principles, could not be held liable. The actual common law rule, however, exonerates an employer only for intentional torts unrelated to the employer's business. Prosser and Keeton on Torts, 505 (5th ed. 1984). This argument, moreover, proves too much, for if racial discrimination were regarded as an intentional tort for which an employer could not be held liable, that doctrine would "insulate[] the municipality from unconsented suits altogether," Owen v. City of Independence, 445 U.S. 622, 647 (1980), even if the tort were committed jointly by a mayor and a city council.

distinct types of rules regarding when an employer was to be held liable for actions of an employee, one set, under the rubric respondeat superior, for torts, and a second set for claims arising in a contract. J. Story, Commentaries on the Law of Agency 521-36 (contract), 536-600 (tort) (1857). Under some circumstances, which we do not here undertake to consider, the differences in those rules might be of significance. The claim in the instant case of constructive discharge is probably more analogous to a contract claim for the wrongful dismissal of an employee than to a tort claim arising, for example, from the injury caused by a negligently maintained street. As we suggest below, however, the disposition of petitioner's claim is the same regardless of whether it is regarded as sounding in contract or in tort.



A. No Proof of Official Policy Is Required In Section 1981 Actions Against Private Defendants

The Fifth Circuit in the instant case expressly held that the doctrine of respondeat superior is applicable to section 1981 claims against a private defendant:

> Plaintiff relies on several cases applying respondeat superior theory under section 1981 in the context of private employment.... Our reasoning, of course, does not prevent the imposition of vicarious liability on a private employer under section 1981.... We believe that the Supreme Court's interpretation in Monell of Congress' intent in enacting section 1983 provides compelling reasons for distinguishing between private and municipal liability under section 1981.

798 F.2d at 763. The lower courts are in virtually unanimous agreement that the principles of respondeat superior are

controlling in section 1981 claims against private employers.[7]

A majority of this Court is already committed to the view that the liability of an employer, at least of a private employer, can be based on the principles of respondeat superior. In General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982), the Court considered a variety of assertions that the employer association in that section 1981 case should be held liable for discrimination

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[7] E.E.O.C. v. Gaddis, 733 F.2d 1373, 1380 (10th Cir. 1984); Miller v. Bank of America, 600 F.2d 211, 212-13 (9th Cir. 1979); Flowers v. Crouch Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Malone v. Schenk, 638 F. Supp. 423, 424-25 (C.D. Ill. 1985); Dickerson v. City Bank and Trust Co., 590 F. Supp. 714, 717 C.D. Kan. 1984); Jones v. Local 520, International Union of Operating Engineers 524 F. Supp. 487, 492 (S.D. Ill. 1931); Lucero v. Beth Israel Hospital Center, 479 F. Supp. 452, 455 (D. Colo. 1979); Croy v. Skinner, 410 F. Supp 117, 123 (N.D. Ga. 1976); Cf. Isard v. Arndt, 483 F. Supp. 261, 263 (E. D. Wisc. 1980) (section 1982).



by a union hiring hall. Justices O'Connor and Blackmun insisted, in a concurring opinion, that the plaintiffs would be entitled on remand to redress against the employers if they could demonstrate that a principal-agent relationship in a fact existed between the employers and the union, thus establishing "the traditional element[] of respondeat superior." 458 U.S. at 404. Justices Marshall and Brennan expressly endorsed this aspect of Justice O'Connor's opinion. 458 U.S. at 417 n. 5 (dissenting opinion). Although Justice Stevens did not address that issue, he has repeatedly insisted that respondeat superior should be applied even in a section 1983 case. Pembauer v. Cincinnati, 475 U.S. 469, 489 (1866) (concurring opinion); Oklahoma City v. Tuttle, 471 U.S. 808,834-44 (1985) (dissenting opinion). Despite the fact

that the defendant employers in General Building Contractors expressly urged this Court to apply to section 1981 the "policy or custom" requirement of Monell,[8] the remaining members of the Court in General Building Contractors premised their opinion on "the assumption that respondeat superior applies to suits based on 1981", 458 U.S. at 395, and held, because of the apparent absence of a master-servant relationship, that the imposition of liability in that case would have required an unwarranted "extended application of respondeat superior." 458 U.S. at 392 n. 18; see also id. at 394 n. 19 (Supreme Court itself to decide whether the facts of the case were "sufficient to invoke the doctrine of respondeat superior").

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[8] Brief for Petitioners, No. 81-280, pp. 10, 22-24.



Certainly with regard to a private employer there can be no doubt that the extent of an employer's liability for violations of section 1981 by its employees would, where the violation sounded in tort, be controlled by the principles of respondeat superior. In the nineteenth century the doctrine of respondeat superior was recognized as "one of the oldest and best settled doctrines of the common law." City of Dayton v. Pease, 4 Ohio St. 80, 95 (1854). The principle of respondeat superior had its roots in Roman law, J. Story, Commentaries on the Law of Agency, 594 (1857), and was familiar to Blackstone. 1 Blackstone's Commentaries 431-32. By the middle of the nineteenth century both the doctrine of respondeat superior, and various applications and ramifications of the rule, were well settled. See J. Story, Commentaries

on the Law of Agency, 536-600 (Boston, 1857); F. Hilliard, The Law of Torts, v. 2, pp. 524-29 (Boston, 1859); C. Smith, A Treatise on the Law of Master and Servant, pp. 151-93 (Philadelphia, 1852); W. Paley, A Treatise on the Law of Principal and Agent, pp. 294-98 (Philadelphia, 1840); W. Theobald, The Law of Principal and Surety and Principal and Agent, pp. 296-300 (New York, 1836). Similarly, under contract law, although there were complex rules regarding when an agent could make a contract binding his or her principal, once such a contract was made the principal was clearly liable if the agent breached the agreement. Story, supra, pp. 521-36; Smith, supra, pp. 122-43. In 1866, if the employee of a private concern were wrongfully dismissed, or if a third party were injured by the tortious conduct of a servant acting within the course of



his employment, the employer or master would have been liable under state law for the ensuing damages. There is no indication that Congress intended to depart from those established principles and to impose for a violation of section 1981 any lesser degree of responsibility or liability.

Indeed, such a departure from common law principles would fairly fly in the face of the 1866 Civil Rights Act itself. Section 1981 requires in part that blacks be accorded "the same ... full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." If in 1866 a white worker had been wrongfully discharged, he could have obtained an award of lost wages in state court without proof that his employer had a "policy or custom" of wrongfully dismissing employees. The contract clause of the 1866 Civil Rights

Act made it wrongful to discharge an employee on account of his race; it is inconceivable that Congress intended to give to a black employee wrongfully discharged in violation of federal law a remedy in any way less efficacious than the remedy available to a white employee wrongfully discharged in contravention of state law.

B. No Proof of Official Policy Is Required in Section 1983 Actions Against Governmental Defendants

If respondeat superior, and comparable contract principles, apply to a section 1981 action against a private employer or other entity, it would be strange indeed if a lesser standard of liability, and responsibility, applied to governmental defendants. This Court observed in Owen v. City of Independence that it would be

> "uniquely amiss" ... if the government itself -- "the social organ to



> which all in our society look for the promotion of liberty, justice, fair and equal treatment ..." -- were permitted to disavow liability for the injury it has begotten.

445 U.S. at 651. Surely it would be even more amiss if a city or school board could under federal law assert immunity from a claim for which a private defendant would be financially liable. The fifth circuit evidently reached this peculiar result because, although acknowledging that section 1981 covered private conduct, it harbored doubts as to whether the 1866 Act applied to cities at all. 837 F.2d at 247-48. While we adhere to the view which we expressed in Patterson v. McLean Credit Union, No. 87-107, that the 1866 Act applies to private as well as governmental discrimination, nothing in that history suggests any intent on the part of Congress to prohibit only private discrimination, or to apply to private

institutions principles of liability more stringent than were applicable to governmental defendants.

The common law principles which would have been familiar to the thirty-ninth congress encompassed no rule comparable to the "policy or custom" doctrine in Monell. That doctrine was virtually unknown to Anglo-American jurisprudence prior to the 1978 decision in Monell itself. In the mid-nineteenth century, as this Court explained in Owen v. City of Independence, there were two somewhat ill-defined circumstances in which a municipality could be sued in tort in state or federal court. First, cities could be held liable for injuries caused by tortious actions of a "proprietary" rather than "governmental" nature. The building and maintenance of city bridges and streets were the most widely recognized type of proprietary



functions, while the adoption of ordinances was ordinarily deemed a governmental act. Second, cities were subject to suit if they violated a duty imposed by state law or by their own charters, but not for "discretionary", "legislative" or "judicial" activities. 445 U.S. at 644-49. The instant case does not require this Court to resurrect and apply these elusive distinctions, because it is clear that Congress did intend to allow suits against municipalities under section 1981, and thus that it would have rejected the absolute immunity accorded to "discretionary" "governmental" acts. Rather, the historical issue of importance is to ascertain what principles of liability would in 1866 have been applied to municipalities in those instances -- be they for "proprietary" or "ministerial"

actions -- when cities were subject to suit.

It is quite clear that in 1866, when a city was subject to suit in tort, both federal and state courts consistently applied the doctrine of respondeat superior. Tort actions based on a violation of a statutory or ministerial duty are of particular importance, since they are most closely analogous to a violation of section 1981. In Weightman v. Washington, 66 U.S. (1 Black) 39 (1861), the plaintiff sued the District of Columbia for injuries sustained as a result of the collapse of a bridge then spanning Rock Creek at K Street. 66 U.S. at 45-46. The city argued that it was "not responsible for the nonfeasances or misfeasances of the persons necessarily employed" by the city to build and maintain the bridge. This Court unani-



mously rejected that argument, holding that the city was subject to suit because the case involved a violation of a ministerial rather than a discretionary duty, and that liability could be based on negligence by city employees:

> Municipal corporations undoubtedly are invested with certain powers which, from their nature, are discretionary, such as the power to adopt regulations or by-laws ... [I]t has never been held that an action ... would lie against the corporation ... for the failure ... to perform such a duty. But duties arising under such grants ... must not be confounded with the burdens imposed, and the consequent responsibilities arising under another class of powers usually to be found in [municipal] charters, where a specific and clearly defined duty is enjoined.... Where such a duty ... is enjoined, and ... the means to perform the duty are placed at the disposal of the corporation ... they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.... [T]hey are liable for the negligent and unskillful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another.

66 U.S. at 50-51 (emphasis added). On two other occasions prior to 1866 this Court sustained claims against municipalities based on similar claims of negligence by city employees. Nebraska City v. Campbell, 67 U.S. (2 Black) 590 (1863) (neglect to repair bridge, in violation of city charter); City of Providence v. Clapp, 58 U.S. (17 How.) 161 (1854) (negligent failure to remove snow from sidewalk, in violation of state statute).

The applicability of respondeat superior in such cases was indeed "well settled." Nebraska City v. Campbell, 67 U.S. at 592. In Hickock v. Trustees of Village of Plattsburgh the New York Court of Appeals observed, with regard to "the liability of municipal corporations for damages arising from the negligence of malfeasance of their officers," that it



was already "established" that when a municipal corporation

> has become bound ... to do certain things, such corporation ... is liable, in case of neglect to perform ... to a private action at the suit of any person injured by such neglect ... [W]henever it exercises its corporate powers, it is bound to see that due care and caution are used to avoid injury to individuals. It can, of course, be no excuse for the corporation, any more than it would be for an individual, that the work was done and the want of care shown by an employee or servant whom [it] had set to work.

16 N.Y. 158, 162-72 n..[9] The Louisiana Supreme Court agreed in 1850 that "The

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[9] Several other New York cases also so held. Kavanagh v. City of Brooklyn, 38 Barb. 232, 237 (Sup. Ct. 1862) (city liable where a "duty, purely ministerial, is violated or negligently performed by a public body or officer"); Lloyd v. Mayor, etc. of New York, 5 N.Y. 369, 374 (1851) (where a city's "duty to perform ... is clearly ministerial ... [t]he principle of respondeat superior consequently applies"); Mayor, etc. of City of New York v. Furze, 3 Hill (N.Y.), 618-619 (Sup. Ct. 1842) ("a municipal corporation is ... liable ... where a duty, specifically enjoined upon the corporation as such, has been wholly neglected by its agents").

liability of municipal corporations for the acts of their agents, as a general rule, is too well settled at this day to be seriously questioned", noting that while some exceptions to the rule existed, it necessarily applied where a city employee had failed to perform a duty established by state statute. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850). Similar decisions were issued prior to 1866 by state courts in



Illinois,[10] Indiana,[11] Maryland,[12] Ohio,[13] and Pennsylvania.[14] The North Carolina

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[10] Browning v. City of Springfield, 17 Ill. 143-45 (1855) (municipalities "like individuals are liable for the negligent, unskillful acts of their servants and agents" where they are "charged with a full, specific and complete duty").

[11] City of Logansport v. Wright, 25 Ind. 512, 515 (1869) (where an act "is ministerial in its character" municipal corporations are liable for "the negligence or unskillfulness of their agents").

[12] Mayor, etc. of Baltimore v. Marriott, 9 Md. 160, 174-44 (1856) (upholding jury instruction imposing liability on city for lack of "ordinary care and diligence" by "its agents" because statute imposing duty on Baltimore placed it "upon the same footing which is held by individuals and private corporations ... and so are the consequences the same for its disregard").

[13] City of Dayton v. Pease, 4 Ohio St. 80, 99 (1854) (quoting Lloyd v. Mayor, etc. of New York).

[14] Dean v. New Milford Township, 5 Watts & Serg. (Pa.) 545, 546 (1843) (upholding claim against municipality because "whenever an individual has sustained injury by the misfeasance or nonfeasance of an officer who acts or omits to act, contrary to his duty, the law affords redress"). See also City of

Supreme Court, in an expansive view of the nature of a municipality's obligations, reasoned that any grant of power to a city implied a condition that actions taken pursuant to that grant would be performed "in a skillful and proper manner." Meares v. Commissioners of Wilmington, 31 N.C. 73, 81 (1848). A plaintiff injured by a violation of that duty was entitled to sue the city commissioners "as a corporation, in which capacity they procured the work to be done, and are liable for the damage done

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Richmond v. Long's Administrators, 17 Gratt. (Va.) 375, 381 (1867) ("Wherever it can be said that distinct duties are imposed upon a [municipal] corporation, purely ministerial and involving no exercise of discretion, the same liability attaches as in the case of private persons owing the same service under the law. To this ... class belong numerous cases of recovery against corporations for the torts or negligence of their servants") (citing, inter alia, Weightman v. Washington and Mayor, etc. of New York v. Furze).



by their agent, under the rule respondeat superior." 31 N.C. at 79.

The principle of respondeat superior was also widely applied to delineate the scope of municipal liability where a city was subject to suit because of injuries occasioned by "proprietary" activities. The Ohio Supreme Court held that

> When a municipal corporation undertakes to ... construct[] improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed, that it is to be treated merely as a legal individual ... and subject to all the liabilities that pertain to private corporations or individual citizens.

City of Dayton v. Pense, 4 Ohio St. 80, 100 (1854). In such circumstances

> We have again and again affirmed, that the liabilities of corporations, private and municipal, are no less extensive, and that the maxim, respondeat superior, properly applies to them, in the same manner, and to the same extent, as in its application to the liabilities of private individuals.

4 Ohio St. at 95. In Tennessee, Mayor, etc. of Memphis v. Lasser, 28 Tenn. 757 (1849), held that where the object of a city activity was "to confer a direct benefit or convenience upon the inhabitants" or "to swell the revenues,"

> [m]unicipal corporations are ... liable for the wrongful acts and neglects of their servants and agents, upon the same grounds, in the same manner, and to the same extent as natural persons.

28 Tenn. at 761. The Indiana Supreme Court ruled in 1848:

> It may ... be considered settled law that municipal corporations are responsible to the same extent and in the same manner as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefits of the cities....

Ross v. City of Madison, 1 Ind. 281, 284 (1848). The Iowa Supreme Court agreed that

> [t]he doctrine that a municipal corporation is liable for malfeasance, or the negligence of its agents in the construction of public



> improvements upon precisely the same principle and under the same circumstances as the individual citizen ... may be regarded as well established.[15]

Cotes & Patchin v. City of Davenport, 9 Iowa 227, 235 (1859).[16] Similar decisions in the decades prior to 1866 are to be found in Alabama,[17] Illinois,[18]

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[15] See also Logansport v. Wright, 25 Ind. 512, 515 (1865).

[16] See also Templin v. Iowa City, 14 Iowa 59, 60 (1862).

[17] Dargan v. Mayor of Mobile, 31 Ala. 469, 475-77 (1858) (city liable for "negligence," "misconduct" and "unskillful and incautious" acts of employees "where they are employed about its private interests; as, for instance in the improvement of its private property").

[18] Nevins v. City of Peoria, 41 Ill. 502, 515 (1866) ("a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others ... respondeat superior ...").

Kentucky,[19] Louisiana,[20] Maine,[21] Maryland,[22] Michigan,[23] Missouri,[24] and

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[19] Prather v. Lexington, 13 Ben. Monroe's Ky. Rep. 559, 560-61 (1852) ("cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit").

[20] Stewart v. City of New Orleans, 9 La. Ann. 461, 462 (1854) (a city "in the exercise of powers ... which are conferred upon it for private purposes ... is answerable for the acts of those who are in law its agents ... and ... is to be regarded as a private company").

[21] Small v. Inhabitants of Danville, 51 Me. 359, 362 (1864).

[22] County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468, 476-77 (1863) (county "is responsible for the acts of those who are in law its agents" for injuries occurring in the exercise of "private franchises").

[23] City of Detroit v. Corey, 9 Mich. 165, 183-86 (1861) (where a city's "private purposes" or "private property" are envolved, "the rule of respondeat superior is applicable").

[24] City of St. Louis v. Gurno, 12 Mo. 414, 419-21 (1849) (city "liable for the negligence and unskillfulness of its agents" in activities "for her emolument



New York.[25]

In the mid-nineteenth century municipal liability was not consistently limited to conduct involving proprietary

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or convenience").

[25] Mayor, etc. of New York v. Bailey, 2 Denio 433, 447 (Ct. of Errors 1845) ("municipal corporations ... have been held liable for the acts of their officers and agents of whom they had the appointment and supervision ... when the duty to be performed was for the benefit of the corporation"); Morey v. Town of Newfane, 8 Barbour 645 (Sup. Ct. 1850) ("The doctrine is now well settled that a municipal corporation ... enjoying franchises and privileges for its own convenience or benefit, is liable in a civil action for any injury resulting either from its misfeasance or that of its officers"); Delmonico v. Mayor, etc. of New York, 1 N.Y. Super. Ct. 222, 226 (1848) ("It has frequently been decided in this court, that the corporation of the city is liable for injuries occasioned by the negligence, unskillfulness or malfeasance of its agents and contractors, engaged in the construction of its public works"); Hickok v. Trustees of Plattsburgh, 15 Barbour (N.Y.) 427, 436 (Sup. Ct. 1853) (city is "responsible for its negligence or unskillfulness of its agents and servants when employed in the construction of a work for the benefit of the city or town") (emphasis in original).

activities or violations of legal duties; in those opinions apparently imposing liability without regard to the nature of the activity or duty involved, the principle of respondeat superior was also applied. In Pritchard v. Georgetown, 19 Fed. Cas. 1348 (C.C.D.C. 1819), the plaintiff complained that his property had been injured when city workers regraded the street beside his home; Chief Judge Cranch held that "if the act was done by the agents, ignorantly or negligently, the corporation [of Georgetown] is liable." 19 Fed. Cas. at 1349. The court in Anthony v. Adams, 42 Mass. 284, 285 (1840), observed:

> We can have no doubt that an action ... will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants and agents, shall perform their acts so carelessly, unskillfully or improperly, as to cause damage to others.



In Missouri, Hilsdorf v. City of St. Louis, 45 Mo. 94, 97 (1869), held:

> corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and their acts are but the acts of individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.

(Emphasis in original). Similar statements can be found in a number of other opinions of this era.[26]

Respondeat superior doctrines permeated municipal liability litigation

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[26] Roberts v. City of Chicago, 26 Ill. 249, 252 (1861); Allegheny County v. Rowley, 4 Clark (Pa.) 307, 308 (1849); City of Milwaukee v. Davis, 6 Wisc. 377, 387 (1858); Conrad v. Trustees of Ithaca, 10 N.Y. 158, 172-73 (1857); cf. Fowle v. Common Council of Alexandria, 28 U.S. (3 Pet.) 398, 409 (1830) (city not liable because wrongdoer not "the officer or agent of the corporation.")

in this era. Even when the alleged wrongdoer was a high ranking official, liability was premised on the fact that he was an employee acting within the scope of his employment, rather than on any notion that such officials were policy makers or otherwise unique.[27] In several instances claims against municipalities turned on the familiar question of whether the relevant employee was in fact acting within the scope of his employment,[28] and a large volume of litigation concerned whether particular workers were city employees, thus rendering appropriate the application of respondeat superior, or

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[27] Hooe v. Alexandria, 12 Fed. Cas. 462 (C.C.D.C. 1802) (city street commissioner).

[28] Hooe v. Alexandria, 12 Fed. Cas. 462 (C.C.D.C 1802); Anthony v. Inhabitants of Adams, 42 Mass. 284, 286 (1840); Wilde v. City of New Orleans, 12 La. Ann. 15 (1857).



were independent contractors.[29] The application of respondeat superior to municipalities -- in those instances when they could be sued at all -- was consistent with the general nineteenth century practice of holding cities "to the same standards of liability as any private corporation." Owen v. City of Independence, 445 U.S. 622, 644 (1980).[30] In

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[29] Nevins v. City of Peoria, 41 Ill. 502, 515-16 (1866); St. Paul v. Seitz, 3 Minn. 297 (1859); Barry v. City of St. Louis, 17 Mo. 121 (1852); Kelley v. Mayor, etc. of New York, 4 E.D. Smith (N.Y.) 291 293 (Ct. Com. Pleas 1855); Treadwell v. Mayor, etc. of New York, 1 Daly (N.Y.) 123, 127-28 (Ct. Com. Pleas 1861); Pack v. Mayor, etc. of New York, 8 N.Y. 222 (1853); Kelly v. Mayor, etc. of New York, 11 N.Y. 432, 435-36 (1854); Cincinnati v. Stone, 5 Ohio St. 38 (1855); Painter v. Pittsburgh, 46 Penn. St. 213, 220 (1863); Smith v. Milwaukee, 18 Wis. 63 (1864).

[30] See also Smoot v. City of Wetumpka, 24 Ala. 112, 121 (1854); Browning v. City of Springfield, 17 Ill. 143, 147-48 (1855); Creal v. City of Keokuk, 4 G. Greene (Iowa) 47, 50 (1853); Freeland v. City of Muscatine, 9 Iowa 461, 464 (1859); Wallace v. City of Muscatine, 4 G. Greene (Iowa) 373, 374-75 (1854);

Chicago v. Robbins, 67 U.S. (12 Black) 418 (1863), this Court held that it would be wrong to permit joint tortfeasor indemnification to be "determined by a different rule of decision from the rights of private persons," 67 U.S. at 425, merely because one of the tortfeasors was a municipality.

The principle of respondeat superior was applied, ironically, to claims by slaveowners that their slaves had been injured or been permitted to escape as a result of misconduct by city employees. In Johnson v. Municipality No. One, 5 La. Ann. 100 (1850), jail officials had violated their legal duty to advertise the name of any slave in their custody, and had failed to keep the slave at issue

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City of Baltimore v. Marriott, 9 Md. 160, 174 (1856); City of St. Louis v. Gurno, 12 Mo. 414, 419 (1849); Rochester White Lead Co. v. City of Rochester, 3 N.Y. 463, 468 (1850).



under tolerable conditions. A Louisiana judge awarded the former slaveowner $600 for the death of a slave who became fatally ill while in the New Orleans jail:

> The disease was contracted in prison; ... it was aggravated by prison fare; and ... the circumstances in which the patient was found ... were neither fit nor decent for a human being of any color. I think a sufficiently strong case of omission of duty has been made out against the agents of the defendants.

5 La. Ann. at 101.[31] Surely if the doctrine of respondeat superior controlled a city's tort liability for injuries suffered by the "property" of slaveowners in violation of state law, Congress could not have intended to hold cities to a

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[31] See also Clague v. City of New Orleans, 13 La. Ann. 275 (1858) (slaveowner entitled to recover from muncipality if her slave escaped as a result of "illegal" or "negligent" acts by "agents of the city"); Kelly v. City of Council of Charleston, 4 Rich. Law (S.C. 426, 433 (1850) (slaveowner claim for damages due to death of slave rejected because of lack of proof city employees had violated any "duty").

lesser standard of liability for harms to freedmen inflicted in violation of the 1866 Civil Rights Act.

The same conclusion is compelled if a particular claim under the 1866 Act sounds in contract, although the matter is considerably simpler. The sometimes elusive distinctions regarding when a city would be sued in tort never existed in contract; under the common law a principal was always liable for any breach of its contract occasioned by the act or omission of an agent or employee. This Court noted in Monell that counties and municipalities were regularly sued in federal court for violations of the financial undertakings in their bonds. 436 U.S. at 673 n. 28. In state court, coincidentally, the largest volume of contract claims against local government bodies were proceedings brought against cities or school boards by



teachers who had allegedly been wrongfully dismissed[32] or improperly denied their salaries.[33] Cf. Owen v. City of Independence, 445 U.S. at 639 and n. 19. In most of the successful wrongful discharge cases the courts found that the dismissal at issue violated the relevant city charter,

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[32] Gilman v. Bassett, 33 Conn. 298 (1866); Shaw v. Mayor of Macon, 19 Ga. 468, 469 (1856) (city Marshall); City of Crawfordsville v. Hays, 42 Ind. 200 (1873); Inhabitants of Searsmont v. Farwell, 3 Me. 450 (1825); Mason v. School District No. 14, 20 Vt. 487 (1848); Richardson v. School District No. 10, 38 Vt. 602 (1866); Holden v. Shrewsbury School District No. 10, 38 Vt. 529 (1866).

[33] Neville v. School Directors of District No. 1, 36 Ill. 71 (1864); Botkin v. Osborne, 39 Ill. 101 (1866); Casey v. Baldridge, 15 Ill. 65 (1853); Trustees of Town of Milford v. Simpson, 11 Ind. 520 (1858); Harrison Township v. Conrad, 26 Ind. 337 (1866); Cross v. District Township of Dayton, 14 Iowa 28 (1862), Offut v. Bourgeois, 16 La. Ann. 163 (1861); Rolfe v. Cooper, 20 Me. 154 (1841); Batchelder v. City of Salem, 58 Mass. 599 (1849); George v. School District No. 8, 20 Vt. 493 (1848); Paul v. School District No. 2, 28 Vt. 575 (1856); Doyan v. School District, 35 Vt. 520 (1803).

or that the dismissal had been ordered by an official who lacked any authority whatever to fire a teacher. The state courts regarded such a lack of authority as establishing the plaintiff's right to recover, not, as in St. Louis v. Praprotnik, 99 L. Ed. 2d 107 (1988), as constituting some sort of affirmative defense.

If, in 1867, a public school teacher had been dismissed on account of race, it is clear that the teacher would have been entitled to relief under section 1981 against the school board or town for which he or she worked, without regard to the existence or absence of any relevant general policy or custom. The result would have been the same regardless of whether the teacher's claim was treated as an action in contract or in tort. Unless the adoption of the 1871 Civil Rights Act



has somehow changed the meaning of the 1866 Act, no proof of policy or custom is necessary today under section 1981.

## II. THE RIGHTS AND REMEDIES CREATED BY THE 1866 CIVIL RIGHTS ACT WERE NOT ALTERED BY THE ADOPTION OF THE 1871 CIVIL RIGHTS ACT

Had the 1871 Civil Rights Act never been adopted, there would be no doubt that petitioner could prevail in this action without being required to prove the existence of any policy or custom. As originally enacted the 1866 Civil Rights Act created a cause of action against governmental bodies both for discriminatory acts pursuant to some official policy, and for discriminatory acts not rooted in such policies. The second type of claim may still be asserted by petitioner unless it was somehow repealed by the adoption of the 1871 Act.

"This Court has recognized, however, that 'repeals by implication are dis-

favored.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984). A party asserting that Congress intended any repeal by implications "bears a heavy burden of persuasion." Amell v. United States, 384 U.S. 158, 165-66 (1966). Such an implied repeal will be found only where there is "some manifest inconsistency or positive repugnance between the two statutes." Merrantile Nat. Bank v. Langdeau, 371 U.S. 555, 565 (1963). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535 551 (1974); see Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-34 (1974).

The court below did not purport to find any positive repugnance between



section 1983, as construed by Monell, and a broader form of liability under section 1981. It is entirely understandable that Congress would have chosen to utilize different principles of liability and responsibility under the two statutes. First, because section 1981 forbids only certain types of racial discrimination, and because racial discrimination is the evil that lies at the very heart of the three reconstruction era constitutional amendments, Congress might well have favored more stringent remedies under the section 1981 than it thought appropriate for the wide range of constitutional and statutory claims made actionable under section 1983. Second, because the types of conduct forbidden by section 1981 are specified in detail, while the substantive requirements enforceable under section 1983 are only incorporated by reference

and are considerably less clear, Congress could have believed that only in section 1981 cases would it be fair to apply the common-law doctrine of respondeat superior. Finally, because section 1981 extends to private as well as governmental conduct, a failure to apply common-law principles to government bodies would have created disparate results under the same statute; since, however, section 1983 reaches only action under color of law, no comparable problem arises under that provision.

In Monell this Court concluded that the "policy or custom" requirement of section 1983 was rooted in the language of the 1871 Civil Rghts Act imposing liability only on persons who "subject, or cause to be subjected, any person ... to the deprivation of any rights, privileges or immunities secured by the Constitu-



tion." 436 U.S. at 691-92 (emphasis added). But if that is how the forty-second Congress understood section 1 of the 1871 Civil Rights Act, it would surely have realized that section 1 of the 1866 Civil Rights Act would not be construed in the same manner, since the earlier statute clearly contains no such restrictive terms. Congress'- failure to amend the 1866 Act to add comparable language, conforming it to the 1871 Act, can only be understood as indicating an intent that the differently worded statutes would in fact have distinct meanings.

The Fifth Circuit read Monell to suggest that any federal law basing liability on the principle of respondeat superior would have raised in the mind of the forty-second Congress severe constitutional problems. 837 F.2d at 1247. In fact, however, Monell contains no such

holding, and no such conclusion would be warranted by either the debates on the Sherman amendment or the state of constitutional and common law principles in the mid-nineteenth century. Although the Sherman amendment did involve a species of vicarious liability, that was not the feature of the bill which the House found objectionable. Rather, as Monell made clear, critics of the amendment had reservations about the power of Congress to impose on state officials affirmative substantive duties to carry out federal law. Monell v. Dept. of Social Services, 436 U.S. at 673-83. The Sherman amendment was criticized, not because it imposed damages as such on cities and counties, but because the effect of those damages would have been to conscript local officials and government bodies into affording protection against the Ku Klux



Klan; those critics would have objected more, not less, strongly if the amendment, rather than establishing any civil cause of action, had instead directly and expressly imposed such a duty on local authorities.

Equally important, this constitutional argument -- at least in its most absolute version -- did not command the support of a majority of the House. After rejecting the Sherman amendment, the House adopted a substitute provision, now codified in 42 U.S.C. §1986, which did impose some affirmative duties. Section 1986 imposes liability on any person who, having the ability to prevent or aid in the prevention of certain offenses, "shall neglect or refuse to do so;" clearly the impact of that provision would, for example, create affirmative obligations for a sheriff or police official who was

aware that the Klan was conspiring to violate federal law. The distinction between the Sherman amendment and section 1986 is that the rejected amendment imposed liability even on cities and counties which lacked any authority or means under state law to stop the Klan or other rioters, while section 1986 imposes liability only on persons "having the power to prevent or aid in preventing" the specified offenses. Much of the criticism of the Sherman amendment emphasized that it applied to cities and counties that might in fact be powerless to stop the private misconduct at issue.[34]

Perhaps most significantly, members of the House criticized the type of liability proposed by the Sherman amend-

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[34] Cong. Globe, 42nd Cong., 1st sess. 788 (Rep. Kerr), 791-93 (Rep. Willard), 795 (Rep. Blair), 795 (Rep. Burchard), 799 (Rep. Farnsworth) (1871).



ment precisely because it departed from the principles of liability ordinarily applicable to governmental and private defendants. Representatives Kerr, Willard and Poland referred approvingly to the then common civil litigation against cities, described above, for violations of their contracts and of state imposed duties, and objected that such actions were "a very widely different thing"[35] from the Sherman amendment. Representative Kerr denounced the amendment because it departed from "the common law" and "fundamental principles;"[36] Congressman Buchard asserted that the amendment was "altogether without a precedent in this country."[37] These objections would have

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[35] Id. at 794 (Rep. Poland); see also id. at 789 (Rep. Kerr), 792 (Rep. Willard).

[36] Id. at 788.

[37] Id. at 795.

made no sense if the speakers harbored any reservations about the well established common-law doctrine of respondeat superior. Several members of the House acknowledged that the civil liability imposed by the Sherman amendment would be appropriate if cities were or could constitutionally be placed under a duty to keep the peace,[38] and distinguished the amendment from state statutes imposing liability on cities and counties whose officers and authorities had negligently or willfully failed to prevent riots.[39] These remarks bespeak an intent to adhere to, not to repeal by implication, the common law rules of liability.

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[38] Id. at 791 (Rep. Willard), 795 (Rep. Burchard).

[39] Id. at 791 (Rep. Willard), 794 (Rep. Poland).



## CONCLUSION

For the above reasons, the decision of the Fifth Circuit, insofar as it requires proof of an official policy or custom in a section 1981 action, should be reversed.

Respectfully submitted,

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